IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ACCU-SPEC ELECTRONIC
SERVICES, INC.,
Plaintiff

v. CIVIL ACTION NO. 03-394 ERIE

CENTRAL TRANSPORT
INTERNATIONAL, INC. and
LOGISTICS PLUS, INC.,
Defendants

PRETRIAL MOTIONS

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Judge's Chambers, U.S. Courthouse, Erie,

Pennsylvania, on Wednesday, October 12, 2005.

APPEARANCES:

PATRICK DELANEY, Esquire, appearing on behalf of
the Plaintiff.

JEFFREY D. COHEN, Esquire, (via Phone),

appearing on behalf of Defendant Central
Transport International, Inc.

W. JOHN KNOX, Esquire, appearing on behalf of
Defendant Logistics Plus, Inc.

Ronald J. Bench, RMR - Official Court Reporter

P R O C E E D I N G S

(Whereupon, the proceedings began at 3:04 p.m., on Wednesday, October 12, 2005, in Judge's Chambers.)

THE COURT: All right, Mr. Cohen, I'm here with Mr. Knox and Mr. Delaney, who I take it is going to row the boat the rest of the way in lieu of Mr. Pendleton, is that correct?

MR. DELANEY: I am, yes.

THE COURT: As I promised or as advertised this is a get-together to take up the motions in limine. And I'm going to give everybody a crack at it. First of all, I've read the motions. The first motion I want to take up is Central's motion in limine to preclude evidence of special or consequential damages that were not foreseeable. Mr. Cohen, is there anything you'd like to sketch in further for me relative to that issue?

MR. COHEN: With respect to this issue, yeah, I would like to address, there are certain issues raised in the opposition brief. The aspect that was raised there deals with whether or not Central Transport is complaining about the amount of damages and distinguishes it from the type of damages. The cases cited there in that position brief are from the District of New Jersey which speaks to remedial or damages, mitigation damages, as being considered general damages. I

think that blurs the line between what we're really looking at here. We're looking at the foreseeability issue. The freight was picked up in California and it was identified as a crate, it was delivered to Erie. As a matter of law it can be determined that damages associated with transporting technicians from foreign countries, United Kingdom and also transporting the freight at great expense to foreign countries would not be foreseeable. I mean say that mitigation damages themselves are foreseeable and, therefore, any mitigation damages sort of become in the realm of foreseeability, is sort of a slippery slope argument. So in this case, of course, when you have a thing that's being moved, if it breaks, someone is going to mitigate. But with respect to this one, if they wanted to cover the mitigation costs for this type of freight, they need to, according to the law, provide specific information to the carrier so the carrier can protect itself. There really is a disclosure requirement to special damages, that's what I wanted to bring to your Honor's attention.

THE COURT: I appreciate that. Mr. Delaney.

MR. DELANEY: Well, your Honor, I think most of what I need to say is in our brief. And the fact these are repair costs and the costs surrounding the repair, shipping it back, having it inspected. This was the only path for repair, the testimony will be, only path for repair that was available to my client.

THE COURT: Was that the situs of manufacture?

MR. DELANEY: It was.

THE COURT: I presume, Mr. Knox, that you join in both these motions?

MR. KNOX: I am not actually. I'm abstaining on this one, I'm actually joining in opposition with Accu-Spec on the tariff motion, though.

THE COURT: Okay. All right, let's move to the other one then. Mr. Cohen, this is I guess arguably slightly more thornier question about the tariff?

MR. COHEN: With respect to this motion in limine, your Honor, this is a situation, it's not that unique, but it is somewhat unique in this case that we have a shipper's agent, that being Logistics Plus, preparing the bill of lading. It moves the argument off of much of the case law out there where there's just a simple shipper and a carrier. It moves it a little bit because in this case not only is there a sophisticated middle entity, which is the agent of the shipper, but this entity actually drafted and prepared the bill of lading. So what I'd like to address first, your Honor, is the aspect of the fair opportunity to choose rates. In this case since the shipper prepared, essentially the shipper prepared the bill of lading. Reading this Emerson case, the Emerson case is a good summary of the history of the Carmack Amendment, as well as the choice of terms analysis over time. But it

certainly states in the Emerson case that the shipper is charged with constructive knowledge of the content of the carrier's tariff. I think the first thing you should look at is taking steps to this conclusion is Logistics Plus bill of lading, your Honor. It's found at Exhibit A to the motion in limine. It provides in the top that the freights received subject to classifications and tariffs in effect on the date of issuance of the bill of lading. That's on the top in small print, first paragraph. On the bottom of that first paragraph it says, where it says (2) in dealing with subject to all terms, and then if you follow along, it's not in rail shipment -- if you go to two. In the applicable motor carrier classification or tariff, if it's a more carrier shipment, it follows by saying shipper hereby certifies --

THE COURT: Mr. Cohen, I have a court reporter here.

MR. COHEN: That's not fair to the court reporter, thank you.

THE COURT: It's also not fair to any of us, we can't follow it. Start that all over again.

MR. COHEN: Certainly, your Honor. With respect to the document, I was looking at Logistics bill of lading found at Exhibit A, okay. Logistics Plus prepared this document. It's identified as straight bill of lading short form on the top under the Logistics logo. In the top paragraph underneath where it stays straight bill of lading, there is a paragraph.

And it says in all caps received. And then the text I'm reading follows the word received in regular text. It says subject to the classifications and tariffs in effect on the date of the issue of this bill of lading, that's part one that I want the court to understand. Then if you continue reading this, although, it doesn't really specifically focus on our issue. It just, if you follow it along to the bottom of the first paragraph, in fact the last segment of the first paragraph there, says two, do you see that, your Honor --

THE COURT: Actually, I'm just following along, go ahead.

MR. COHEN: Very good. In the line right above that it says subject to all terms and conditions of the uniformed domestic straight bill of lading set forth in, then (1), uniformed freight, in effect on the dates hereof, that's only if this is a rail or rail water shipment, we do not have a rail or a rail water shipment here. Because of that, you have to follow in that sentence to the next phrase, it says or, (2), in the applicable motor carrier classification or tariff, if this is a motor carrier shipment, this data, this text right there is what incorporates the tariff of Central Transport. We'll move to that later on. However, what I'd like to also read into the record is the second paragraph there which makes it undeniably clear what the shipper is agreeing there. The shipper hereby certifies that he is familiar with all of the

terms and conditions of the said bill of lading. Including those on the back thereof set forth in the classification or tariff which governs the transportation of the shipment. And the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns. This is the bill of lading that was prepared by effectively the shippers, Logistics Plus. So they in doing so acting on the shipper's behalf are essentially saying I agree to the carrier's tariff.

And what I have attached as Exhibit B, your Honor, to the motion in limine, is the exact tariff from the right timeframe, which this document, which the Logistics bill of lading incorporates. It's entitled to tariff, CTII 100C. It starts at Bates number CT0154. Following those pages are the sort of heading of this tariff. And then on page -- let's skip to page 193 for a moment, page 193, on page CT193, it is the last page of the exhibit, your Honor. There is a section item 579. Item 579, which is part of this tariff, provides that shipments of used machines or machinery, will not be accepted by the carrier unless the shipper releases the value not to exceed 10 cents per pound per package. And a very important part of this particular section here, your Honor, is this next phrase, or declares a higher value. Shipments of used machines or machinery must be crated to protect all surfaces of -- crating is not an issue because it was crated. And it goes on to say if shipment is inadvertently accepted without the declaration of a release value, it will be considered to have been released at a value not exceeding 10 cents per pound per package. And in charging on that basis, carrier liability will be 10 cents per pound per package, a corrected bill of lading will not be accepted to change the relief value once the shipment has been accepted by the carrier. That section, again, is also not relevant because that didn't happen. What we have here, and there's another section I do need to inform the court of, what we have here is we have basically a governing document, the bill of lading. The bill of lading incorporates the tariff. The tariff provides for a limitation of liability and a choice of the different limitation of liability if a higher value is declared. So with respect to the case which is relied upon by counsel, the Emerson case, which again it does have a good summary. The Emerson case comes to a different conclusion with respect to the carrier in that matter, because the tariff in that case did not provide for a separate alternate pricing if there was a declared value. I direct the court's attention in

that case, if they have it, to page 729, going on to 730,
bottom of page 729 -- the court in Emerson indicates that
defendant's tariff, this is the carrier's tariff, however,
regardless of whether plaintiff declared the value on the bill
of lading, limited in liability to 10 cents per pound,
providing plaintiff with no opportunity to choose alternative
rate or a different level of liability coverage. So

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effectively the court in that case was saying you're only
offering 10 cents a pound, you don't give an option, so you're
not fulfilling the option requirement in this particular
scenario. So the difference being with the Central Transport
bill of lading or tariff, they are offering an alternative or
declaring a higher value. Now, this brings me to the next
point, your Honor, and that relates to the tariff itself in a
different section. I direct your attention to Bates number
page 360, I'm sorry, your Honor, it's Bates number CT0163, it's
item 360. In summary what this item does, your Honor, this
item says to whoever ships with Central Transport, you have to
use our bill of lading. If you don't use our bill of lading,

then you have to incorporate the terms of our tariff. And in this particular section, that's found on Bates number 163 at item number three there, not item three, within 360. Bill of lading issued by the carrier is subject to the following. All rates, terms and conditions of the transportation service are subject to and governed by the carrier's rules. Unless a written agreement, separate from the bill of lading, signed by an authorized representative. That has not happened here. Now, under Section 3(d) there, your Honor, it says bills of lading, other than the carrier's bill of lading, uniform straight bill of lading, as published in the National Motor Freight 100 series, or shippers supplied bill of lading, referring to classifications and tariffs applicable at the time

of the shipment, shall not be accepted. Here we happen to have the second phrase. We have a shipper's supplied bill of lading supplied by the agent in this case, Logistics Plus, referring to the classifications and tariffs. Essentially, what that does is it requires or incorporates all these terms, including the limitation of liability, including the terms found on the form bill of lading, which is found at CT0165, on the Bates number also in this exhibit. And I direct the court's attention to that particular document. Because that document is interesting because that is actually a standard bill of lading. That's a straight bill of lading that was authorized by Central Transport for use. This particular bill of lading authorized for use has a box on it in the face. Which says on the bottom or in the middle right hand side, your Honor -- where the rate is dependent upon value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper as not to be exceeding, then there's a blank line. Furthermore, right below that section, in the text underneath where the box it says COD, it says carry liability. Shipments valued at more than $25 per pound are of extraordinary value. And, again, that doesn't address our situation here. But if you read on there, the last sentence of that document, I'm sorry, that section says the agreed value on used machinery does not exceed

10 cents per pound per article. Then it also goes on to incorporate the classifications and tariffs on issue to the date of the bill lading. Which again brings us back to item 579, which offers the alternative of declaring a higher value. So the courts, and you can just use the history in the Emerson case, courts provide or enforce instructive knowledge of shippers, certainly if they prepared the bill of lading, here we have. I'm reading on page 728 of the Emerson opinion, going on to 729. Sophistication of the parties is also an issue. Here we have a logistics company, which is in the business of transportation. And that is also an issue. Now, it should be noted that what we're talking about here is the choice of terms. One rate or another rate effectively. This court in the Western District of Pennsylvania has come to the decision to determining that that choice is still something that needs to be offered. However, the Third Circuit has not addressed this issue in the context of a shipper prepared bill of lading. On page 729 of the opinion there are cases cited, including the scientific case, which speaks to the issue of what actually is needed when a shipper, in this case it's actually a freight

forwarder, with people of equal economic stature and commercial awareness or acuity, are the ones entering into the agreement. The courts are there requesting, in fact the court there decided that the choice of terms of terms isn't required. But here I think not only do we have that sophisticated party,

unquestionably in the transportation industry, but we do have the choice of terms. So if that element is determined by the Third Circuit or this court to be something which must be met, it has been met here. If this bill of lading is determined to be the one issued by Logistics Plus is somehow deficient, which we believe it isn't because there is corporation language, but if the court believes that, that is the shipper's decision, the shipper made this bill of lading. The true terms the bill of lading required and the terms are very clearly spelled out in the tariff, which the shipper incorporated into their own bill of lading.

THE COURT: Let me hear, you both want to weigh in on this is that right -- what we're talking about, just to frame the issue again, it seems to me is we're talking about a principle which says that the shipper had to have both reasonable notice of liability and an opportunity to obtain information necessary to make a deliberate, well-informed choice.

MR. DELANEY: We, Accu-Spec, issues bills of lading. They have nothing of this size. They don't typically ship product of this size or equipment like this. We understand bills of lading. We did not issue a bill of lading here. We contacted Logistics. Logistics gave us one quote, we accepted that quote, and we didn't see the bill of lading until such time as the equipment arrived. We didn't know that Central

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Transport was the shipper until the product arrived at our dock. So we weren't given additional choice of a different rate. We weren't on notice of a particular tariff. We didn't have any of that information.

MR. KNOX: I would agree with that. If I may, your Honor.

THE COURT: Don't agree, you'll talk right over him. You can agree in a minute. Go ahead.

MR. DELANEY: If we're going to limit the discussion just to the issue of our options, the ability to make a choice, and whether that binds us to the tariff, a lower tariff, then that would be our point with regard to that particular aspect of this argument. We also need to talk about whether this is a used piece of equipment.

THE COURT: We're talking about this right now. What do you want to say about this, Mr. Knox?

MR. KNOX: I would agree, clearly the shipper, as Mr. Cohen said, did not prepare this bill of lading. We prepared the bill of --

THE COURT: We meaning Logistics?

MR. KNOX: Correct. This is not something unique in the transaction. We did the bill of lading. So that argument about shipper making a bill of lading, them being bound, I do not think is distinguishable alone on that basis.

THE COURT: Let me ask you this, Mr. Cohen, if I

might.

MR. COHEN: Sure.

THE COURT: And this appears to be an accurate statement of the law, that federal law requires that a carrier may limit its liability only if it gives the shipper a reasonable opportunity to choose between two or more levels of liability. That's Third Circuit law, frankly, that's most places. So I understand your position, is it your position that that opportunity was given to Accu-Spec in this instance almost vicariously since it was given to the agent, Logistics?

MR. COHEN: Well, actually yeah, in this case, your Honor, this court has ruled already that Logistics Plus is effectively, through the other motion where we raised certain issues, Logistics Plus is more akin to a shipper than a carrier in this case. Logistics Plus is undeniably, I don't think there's any question, the agent for the principal, Accu-Spec. So there's no question that Logistics Plus binds Accu-Spec as its agent. But yes, that's right, certainly Central Transport had no contact with Accu-Spec. Central Transport -- except when they drove their truck up and dropped off the machine.

THE COURT: How did Accu-Spec know about Central Transport's tariff?

MR. COHEN: Logistics Plus did.

THE COURT: Returning to my original question, it's imputed, in other words, Logistics knowledge is imputed to

Accu-Spec?

MR. COHEN: Absolutely.

THE COURT: No question about it. Now, alternatively, the other issue being Accu-Spec is identified as a party in this bill of lading document. They're saying they didn't read the bill of lading document but that doesn't mean they shouldn't have asked for transportation documents governing the transportation of freight. If you don't ask for a contract which binds the relationship. I mean Accu-Spec would be sitting back and saying I don't want any document to establish a relationship between the parties here, I didn't see anything, in fact, no paper binds me. There is no agreement -- considering Logistics Plus was its agent, and entered into a transaction that would wait for all shippers to just get over things by not looking at documents that bind the transaction, and where they should be looking at them. Logistics binds its principal. The difficulty of, for instance, there's a slight delay in the way the information is set up. Let me hear in conclusion with what Mr. Delaney has to say, then I want to take up the issue of new versus used. Is there anything else you want to say, though?

MR. DELANEY: Mr. Cohen's insistence that we are bound by the core knowledge of Logistics, I don't agree. I haven't read any case law to that effect. Freight forwarder -- no question we had a contractual obligation with them and they

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have liability under the Carmack Amendment. But their conduct is binding us in terms of their negotiations with us, with other carriers, as I understand the amendment, actually describes Logistics as a carrier from the standpoint of the definition of freight forwarder. I don't think that we're bound by their negotiations with the ultimate carrier.

THE COURT: Now, perhaps this is where we should have started because it's kind of the threshold issue, is the product new or is it used?

MR. COHEN: I'd like to address that, your Honor.

THE COURT: Go ahead.

MR. COHEN: If I may, one last item on limitation of liability, the agency issue. If Accu-Spec believes it's not bound, there's no question Logistics Plus would be bound. So, in other words, the recovery would only be limited to $529 against Central. I presume that Accu-Spec would be able to go against Logistics Plus for the full amount. They didn't protect themselves by doing what they should do. The next issue, your Honor, deals with used versus new. Counsel for Accu-Spec has provided a case -- the Meyers case dealing with the lemon law in the State of Pennsylvania.

THE COURT: I don't think that's on point.

MR. COHEN: I agree with you, your Honor. But there is one aspect of it which actually cuts the other way. Which speaks to how the court analyzes language. In this case, your

Honor, the court did make a finding --

THE COURT: Hold your thought just one second because I want to ask a few predicate factual questions here because the record is a bit undeveloped and I wanted to see, get some stipulation on or agreements so that I could then apply what I think is a pure question of law to the undisputed factual record. Tell me, first of all, I'm going to ask you a legal question, then I'll get back to the facts, Mr. Cohen. I take it that your legal position on behalf of Central is that no matter how de minimus, it renders a previously new product as a used product, is that correct?

MR. COHEN: I'd say yes, any commodity with prior use, that's right.

THE COURT: Let me flip over here to Mr. Delaney. There's a representation made that this product was demonstrated, if you will, if memory serves, for a period of about 12 hours, is that right?

MR. DELANEY: The information we have and this comes from Dage, which we should be able to delve into at this trial, nobody has a record of use of this piece of equipment prior to its shipment on February 5, 2003. It was at a location in California where it could have been used to demonstrate to potential users how it functions. And we were told the best estimate would be that over the course of time there, the maximum amount of use could have been 12 hours. That would have been under the situation where Dage itself, the manufacturer in a controlled environment demonstrating the machine.

THE COURT: To people who might be potential buyers?

MR. DELANEY: Correct.

THE COURT: For purposes of our discussion here, in other words, you're representing that evidence on the point would reflect no more than 12 hours but possibly less than --

MR. DELANEY: That's right.

THE COURT: For purposes of resolving this issue, Mr. Cohen, are you willing to accept that as a factual predicate given your legal position that any use is too much use?

MR. COHEN: Well, that would have to be in context. Maybe we can come to a point of agreement. My understanding is that demo models are there for six months, there also was a discounted price to Accu-Spec because they bought a demo model, got off around $15,000. So with respect to that issue, I think that if I might be 12 hours or 16 months, I don't know. It was on their showroom floor for about six months, and there was a discount. That's going to be, when it comes down to it, that's going to be the full body of testimony. This person may say 12 hours use, I don't know. I also would say it very well may have been transported around to trade shows. It's still all going to fall within the idea of demonstration model. We're

not going to have testimony it was sold to anybody else. It was demonstrated on the floor, possibly six months, possibly 12 hours use and was discounted.

THE COURT: Let's assume that if you believe the factual predicate of this thing then. Now, let's return to Mr. Cohen and your legal point, go ahead.

MR. COHEN: Your Honor, with respect, I was using a case, the lemon law case, which I presume we both agree the lemon law defines special category for the vehicles. Within doing that, the court in this case said that there were certain factors which when they sold the Volvo that this was a new motor vehicle or not. This court determined that these factors suggested that car was new, a new motor vehicle as the phrase may be understood colloquially. That is sort of instructive. Because colloquially is related to conversation or used in characteristic of familiar and for consideration. Using conversational style that is colloquially in Webster's dictionary. We have to apply this. Used can be defined by Webster's as that has endured use. We don't have a statute here which makes a new definition for use. We rely upon what the word means. And because that's how the word is presented in the tariff --

THE COURT: You don't have any case law on the point?

MR. COHEN: I'm sorry, your Honor.

THE COURT: No one has cited me to any case law at all, outside the lemon case law, which is completely inapposite because demonstrator is a term of art that doesn't have anything to do with this case, there is no case law that tells me what is used or used means?

MR. KNOX: If I may. I think there is. In you look at this in the context this is a term that is used in a quote, unquote, alleged contract standard rules of contract interpretation. Is it an ambiguous term. If it is, therefore, construed against the drafter.

THE COURT: I'm inclined in that respect to agree with Mr. Cohen, that you do get one good thing out of that case, you get a colloquial approach, is it new or is it used. To me it's kind of you know it when you see it.

MR. DELANEY: And I don't mean to rely on the lemon law. If I go up and test drive a new vehicle and return it, I'm with the dealer, I drive it around the block, I return it to the showroom floor, is it a new vehicle or a used vehicle. If we're talking about in the colloquial sense, it's still a new vehicle. I think that Mr. Knox is right. I think the burden is on Central Transport to demonstrate what they mean by used. And I think that if we have to resort to a colloquial approach to it, then they bear --

THE COURT: How many hours of life, that's a bad way to put it, what is the operating lifetime of this machine in

terms of hours?

MR. DELANEY: We were told it should last decades. If one assumes it would work about three hours a day, it would be around, I assume two decades, that would be around 15,000 hours of use. We'll try to develop that more precisely, but that's what I was told.

THE COURT: This is here on a motion in limine, that's why the time for development of this, it strikes me, there probably needn't be given one way or the other the broad parameter of agreement as to what this machine is. What I'm hearing is there is a dispute over the interpretation of law. But there really isn't a factual dispute, not likely to be one, as to how the machine was used. But let me ask another question that he brought up there. Mr. Cohen said something about a reduction in price?

MR. COHEN: Your Honor, this thing new is $135,000. Used it's sold at 120,000. When you go test drive that car, you don't get $15,000 off. You get $15,000 off on a demo model. As an aside, just so it's out there, Virginia law has the exact opposite lemon law which says a demonstrator model used car that is bought out of the window -- you know it when you see when it arises. Whether you get a discount, whether it's on the floor for six months, you're being told by the show people that it's used, that's why you're getting a discount.

THE COURT: Did you sell it at a discount?

MR. DELANEY: Did Dage sell it at a discount, I don't know. Mr. Cohen must have heard that during the course of depositions. It wouldn't surprise me, it wouldn't surprise me you might be able to negotiate a piece of equipment like that brand new, not even manufactured as yet, for a lower price than a list of $135,000.

MR. KNOX: Also lurking in the background is a deposition that may or may not take place on Friday, which I think you've been made aware of --

THE COURT: What is it?

MR. KNOX: An anticipated deposition.

MR. DELANEY: That's moot, he's going to be available Tuesday.

THE COURT: All right. Now, let me ask this. How did Central determine the rate that they charged Accu-Spec and was it a rate based upon weight and size or were alternative rates offered on different rates of liability?

MR. COHEN: That's an interesting question. With respect to this transportation rate, there's a full freight rate and then there's discounts off a full rate. This was offered at a discounted freight rate based on classification, which was given. It wasn't based on a flat rate, from my understanding. With respect to this choice of different levels. There are cases out there, I direct the court's attention, it wasn't cited, but it's a case out of the Eastern

District of Pennsylvania which applies the 10 cents per pound limitation on liability. It's W.C._Smith,_Inc._v._Yellow Freight_Systems,_Inc._v._Price_Candy_Company, 596 F.Supp. 515. There's a shipper's bill of lading that correlated the tariff. The tariff provided all the terms. And the court upheld those terms. However, in this particular case, I'm not going to be able to point your Honor -- certainly when there's a significant shipper involved -- what is done here is in the tariff itself, where I've directed your Honor before, the particular section on used machinery. Machines new or used, item 579, it goes back and says either 10 cents per pound or declare a higher value. If it's declared a higher value, then a higher rate would be imposed. And that is, there's also on the bill of lading, which Central Transport references in its tariff, is mentioned. In that document there was a declaration of a higher value. Does that answer your Honor's question?

THE COURT: It does. What do you want to say about this?

MR. DELANEY: Where were we, I kind of got lost.

THE COURT: The essence of the question was, well, there are two parts. How did the they determine the rate and was the rate based on weight and size, and was alternative rates offered?

MR. DELANEY: I don't know what Central Transport was paid. We contacted logistics. Logistics works up the

rates, gives the number to us. We were offered one number and accepted it.

MR. KNOX: It was negotiated, there was a question of fact on that. We're basically saying our guy talked to their guy.

THE COURT: All right, I'll tell you what I'm going to do. I want to spend just a minute or two digesting some of this, I want to chat with my law clerk. And at the conclusion of which I'll either tell you I'll be able to get an order on the record on both these motions or you'll get something in a day or so. Mr. Cohen, I'll put you on hold and ask you gentlemen to step out.

(Recess from 3:40 p.m.; until 4:00 p.m.)

THE COURT: All right, this is going to be an order.

ORDER

This matter is before the court upon defendant Central Transport's motion in limine to preclude evidence of special or consequential damages. In the underlying action, by way of background, plaintiff Accu-Spec is seeking to recover monetary damages for damages to an X-ray machine shipped in interstate commerce between California and Pennsylvania. Should Accu-Spec succeed in demonstrating that this machine was damaged in transit, then Accu-Spec may be entitled to recover monetary damages from Logistics, the freight forwarder, and/or Central, the freight carrier.

The crux of this motion is the measures Accu-Spec took to repair the machine after it arrived damaged at Accu-Spec's facility were not foreseeable. Accu-Spec, after having received the machine, paid to have a representative of the machine's manufacturer travel from England to Pennsylvania to inspect the damage and determine what essentially could be done to fix it. Accu-Spec then paid to ship the machine to the manufacturer's facility in England for repair, incurring thereby several thousand dollars in freight charges and packaging expenses. Central argues that neither Accu-Spec nor Logistics ever informed Central that the cargo to be transported was a specialized machine that could only be repaired by the manufacturer in England, therefore, the cost of transporting the manufacturer's representative and the machine to England and back were not foreseeable. Accordingly, Central's motion requests that Accu-Spec be precluded from being able to introduce evidence of these costs, which they categorize as "special damages," at trial. Accu-Spec responds by asserting that the repair expenses objected to by Central fall within the category of general, rather than special damages, because they constituted fulfillment of Accu-Spec's duty as a shipper to mitigate its loss. Thus, the issue before us is whether the repair expenses addressed by the motion in limine constitute special damages.

General damages are those that are reasonably

foreseeable, whereas special damages are those that a carrier did not have a reason to foresee as ordinary, natural consequences of a breach when the contract was made. See Paper_Magic_Group_v._J.B._Hunt, 318 F.3d 458, 461 (3rd Cir. 2003). Special damages include damages sought for loss of use, loss of future profits, or additional labor incurred. Id. General damages, in contrast, are calculated by the difference in the invoice price of the shipment and the value of the cargo on the date of delivery. Id.

We find here that the expenses incurred by Accu-Spec were not damages for loss of use, future profits, or additional labor incurred, but instead consisted of Accu-Spec's attempt to mitigate the damage to the machine and the machine's value. It is axiomatic that a plaintiff who receives damaged goods has a "duty" to mitigate damages. S.J._Groves_&_Sons_v._Warner_Co., 576 F.2d 524, 528 (3rd Cir. 1978). Because plaintiffs are under this general duty to mitigate damages, "costs incurred in carrying out this duty, can be expected to occur regularly and in every case." Oritani_Savings_&_Loan_Association_v._Fidelity &_Deposit_Company_of_Maryland, 744 F.Supp. 1311, 1322 (D.N.J. 1990). Therefore, "reasonable costs incurred by a plaintiff in an attempt to mitigate its losses are recoverable as a traditional element of damages." Oritani, 744 F.Supp. at 1321.

For the reasons stated above, we conclude that the expenses incurred by Accu-Spec in the course of repairing the

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damaged X-ray machine were a result of Accu-Spec's attempt to mitigate the damage to the machine. Consequently, those expenses constitute recoverable damages, and that motion is denied.

The second motion presently pending before the court is Central's motion in limine to preclude evidence of damages in excess of tariff's limitation of liability. Central's motion asserts that Accu-Spec's recovery of any damages against Central is limited by the terms of the bill of lading and the applicable tariff.

By way of additional brief background, the bill of lading issued by Logistics to Central described the freight only as a "crate" weighing 5,280 pounds. The bill of lading further stated that the freight movement is "subject to classifications and tariffs in effect on the date of issuance of this bill of lading." The tariff applicable at the time of the bill of lading's issuance was Central Transport Tariff CTII 100-C. Tariff Item 579 provides that shippers are only entitled to value the shipment of used articles at 10 cents per pound per package, unless they declare a higher value and pay a higher charge. Thus, Central contends that Item 579 limits their liability to 10 cents per pound for any damage that they may have occurred. Since the disclosed weight on the bill of lading was 5,280 pounds, Central contends that they can only be held liable for damages up to $528.

By way of additional background and for a fuller explanation of the parties position, I incorporate as is fully set forth in the earlier argument which we held on this particular motion. Inasmuch as I find the issue of the new versus the used nature of the machine dispositive, it is unnecessary for me to reach the other issues. Here, it is undisputed that the machine purchased by Accu-Spec was a demo model that the manufacturer used to demonstrate the machine's capabilities to potential buyers. However, the parties have agreed that the machine had 12 hours or less of use on it at the time that it was shipped. Because the useful life of a machine is measured in thousands of hours, Accu-Spec argues that the de minimus use of the machine as a demo model is insufficient to render the machine as "used" within the meaning of the tariff. In support Accu-Spec cites Meyers_v._Volvo_Cars of_North_America, 852 A.2d 1221 (Pa.Super. 2004), which held that an automobile with over 9,000 miles on it was still a "new" car for purposes of the automobile lemon law because it had been used solely as a demonstrator.

The holding in that case, in our view, was entirely reliant upon the lemon law's statutory definition of "new" as specifically encompassing demonstrator vehicles. Indeed, the court in Meyers admitted that the vehicle in question was not a "new motor vehicle" as the phrase might be understood colloquially. Rather, the car was "new" only as a matter of

law, based upon the statutory definition.

Thus, given the absence of any contrary authority that we have been able to locate, we resort instead to the colloquial meaning of the phrases "new" and "used". Here, as indicated before, the X-ray machine was a demonstrator model that had sustained only de minimus use under controlled conditions by the manufacturer. The parties agree it was used not more than 12 hours and that it had a useful life of 15,000. Thus, it was used less than one-tenth of one percent of its useful life. In our view and applying the colloquial meaning to the phrase new and used, we find as a matter of law that the product here was new and, therefore, does not fall within the terms of the tariff and the motion is denied. That takes care of all our motions. Any other loose ends?

MR. DELANEY: As you may know, there was an effort to try to determine the expenditures made by Accu-Spec to repair the machine that were reasonable and necessary. The defendants have both denied that request for admission, I think the court has refused to go any further with that. I'm going to ask just for 30 seconds for your reconsideration of that issue.

THE COURT: What was it I decided?

MR. DELANEY: I believe you decided the admissions would stand, you wouldn't interpret them.

THE COURT: Were binding on them?

MR. DELANEY: That a denial of the request for admissions were adequate, you wouldn't --

THE COURT: Before you go there, let me swing over here. If this thing goes to trial, are we going to spend a portion of the trial litigating the issue as to whether it was reasonable to spend -- I throw a figure out, to spend X amount today as to whether the repairs on the machine were reasonable?

MR. KNOX: We will not, your Honor.

THE COURT: How about you, Mr. Cohen?

MR. COHEN: I don't believe, I don't think we have a basis to challenge the reasonableness of the actual repair costs. One set of costs by your Honor's decision, interest or lease costs associated with the machine for the timeframe when it was not in operation. Which are identified in the demonstrative exhibit. These costs are different from mitigation costs, I believe those certainly fall under special and should be excluded.

MR. DELANEY: Let me just propose this then. Maybe this will assuage Mr. Cohen. We'll have the owner of Accu-Spec come in and say look, we bought this machine on a lease, a lease financing arrangement and in the period of time when we couldn't use it, we had to pay the lease costs on it. And it was, I don't know how many months, to tell you the truth, not an inordinate amount of time. That would be the testimony.

MR. COHEN: That should certainly be precluded, that

speaks to special damages and it's included in the demonstrative, the lease costs. I don't think there's any necessity in providing that to the jury that this was leased and there's going to be a request for recovery of these lease costs.

MR. DELANEY: The question would be whether it's reasonably foreseeable.

THE COURT: What are we talking about?

MR. DELANEY: About 1,500.

THE COURT: I think it's likely, I'll reflect on it, I don't have to rule on that, we're going ahead one way or the other, I understand the issue.

MR. DELANEY: What I've heard from defendants answers the question, I believe, I just want to make it clear. I've arranged for video conference from the UK to your courtroom to get somebody to say reasonable, yes these were reasonable and necessary, I don't have do that now --

THE COURT: I understand that repair costs --

MR. COHEN: As to reasonable and necessary, you don't have to do that, reasonable and necessary.

MR. DELANEY: That includes the inspection of the machine, there was a man who came from the UK to inspect the machine, then it was shipped back to the UK?

MR. COHEN: I don't think that was reasonable.

MR. DELANEY: Let me just put this in context for

you, judge. When the machine was in Erie, we corresponded with Dage, Dage came and took some photographs of the machine. They said look, here's the situation. If there's a leak in this X-ray machine, the only way to test that is that with, for example, a Geiger counter. But you have to turn it on, power it up. But if you turn it on, power it up, then it's a lethal dose of radiation that would escape. And you shouldn't do that. So we said what can we do. They said we will send somebody from England to come in and look at this and tell you what needs to be done. They sent someone from England, that person may have said no, we can't repair it here -- we got to ship it back and repair it. So the expense of that person coming is within the scope of what we think is reasonable and necessary.

THE COURT: Mr. Cohen doesn't have to agree to it being reasonable or necessary, so put the proof on on both sides. Mr. Cohen, you can argue the lack of reasonableness, if you're so inclined, and you just bring out, put the testimony on however you want to put it in. To sharpen the focus here, we're chopping down very little trees in a very big forest. As I understand it, Mr. Cohen, one thing he's not going to have to put proof on, he's not going to have to put any experts on or testimony from other people to say that the shipment of the machine to England and the work they did on it in England was not reasonable or necessary, is that right?

MR. COHEN: We have no way to contest labor or materials in England.

THE COURT: So we're down to the issue as to whether this Englishman's jaunt over here was reasonable and necessary under the circumstances, whether you should be required to pay for it?

MR. COHEN: Packing it up and shipping it to England and back, that came to almost $9,500. It should not have been shipped to England, they could have shipped it to any X-ray machine manufacturing company in the United States, possibly even in Pennsylvania.

MR. DELANEY: But Dage, the manufacturer, that is who we bought it from.

MR. COHEN: Fine, you'll have to convince the jury it should have gone to England, I'll be able to argue to the jury it should have stayed in Pennsylvania.

THE COURT: Mr. Cohen, let's make this real easy for all of us. The peas are starting to move underneath the pod here even too fast for me to follow it. Let me make this very clear. What I'm hearing is he isn't stipulating to the reasonableness -- it obviously was necessary to get it repaired. He's not stipulating to the reasonableness of these repair charges, you put on evidence however you see fit.

MR. DELANEY: This is where I want to go. If I have to bring a guy here, have a guy from the UK, it's a significant

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expense. Now, the point is I believe that in the duty to mitigate, it's a question of whether we acted reasonably based upon the information that was given to us. That it's a question of if my people come in and say here's what we were told, and anticipating a hearsay objection, but I'm not offering it to prove the truth of the matter asserted, we were told this is what it takes, and we made decisions based on that information, that this demonstrates our reasonable acts in mitigating the cost that we incurred, we actually paid. And I think that's sufficient. But I guess I'm looking --

THE COURT: I think my instinct tells me that under the circumstances, if this is coming on as a mitigation issue as to whether the mitigation was reasonable, that's not a question of law, that's a question of fact for the jury to figure out, once they hear everything. That's my view of it, that's the way you should be guided by that. What else did you want to bring to my attention from any standpoint?

MR. DELANEY: I told these gentlemen that there was going to be a deposition on Friday, Mr. Fisher, I understand he's available on Tuesday morning, they will make arrangements to video conference him into the courtroom. I anticipate three or four witnesses on Friday, I'm sorry, on Monday.

MR. KNOX: Who are those, Pat?

THE COURT: Do you know who they are?

MR. DELANEY: It's the owner and gentlemen from

Accu-Spec who were involved in the shipping. Jim Mullen --

MR. KNOX: Who's the owner?

MR. DELANEY: Ernie Carlson.

MR. COHEN: Carlson, who else?

MR. DELANEY: Mr. Mullen. Mullen will testify, by the way, to admissions by Central Transport.

THE COURT: And what do you have?

MR. KNOX: We have Jim Berlin and Chris Fanzini.

MR. COHEN: You have nine witnesses, is that wrong?

MR. KNOX: He just said four.

MR. COHEN: Who else on Monday?

THE COURT: Can you fill up the day with three witnesses on Monday?

MR. DELANEY: I don't know that I can.

MR. KNOX: We're picking on Monday?

MR. DELANEY: We're picking on Monday.

THE COURT: Your other guy is not available till Tuesday?

MR. DELANEY: Fisher is the guy who's going to be by video conference.

THE COURT: I may, just to keep things going, so we don't bring the jury in until 1 o'clock and send them home, I may let the defendants break into their case and put some witnesses on and just keep going. Who are you going to have?

MR. KNOX: Jim Berlin, the CEO of Logistics Plus.

And Chris Fanzini, the contact person who set this up.

THE COURT: How about you, Mr. Cohen?

MR. COHEN: We're going to have a total of three witnesses. One is going to be George Horetsky, the salesperson from Central Transport. The second is Jeff Cackowski, he evaluates the freight claims. Then the third person would be the truck driver.

THE COURT: All right. I think I told you this, but be here at 8:30 on Monday. We'll review any additional voir dire, and I want your points for charge by Friday. Now, let's go off the record.

(Discussion held off the record.)

(Whereupon, at 4:22 p.m., the proceedings were concluded.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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Ronald J. Bench